Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Alaska Department of Health and Social Services
Docket No. A-07-132
Request for Partial Reconsideration of Decision No. 2103
Ruling No. 2008-1

DATE: October 15, 2007

RULING ON REQUEST FOR PARTIAL RECONSIDERATION

The Alaska Department of Health and Social Services (Alaska or State) requests partial reconsideration of this Board's decision in Alaska Dept. of Health and Social Services, DAB No. 2103 (2007). The Board decision affirmed determinations by the Centers for Medicare & Medicaid Services (CMS) to disallow claims relating to supplemental payments Alaska made to private hospitals above the basic Medicaid rates for inpatient hospital services, and to payment adjustments Alaska made to hospitals that disproportionately serve Medicaid recipients and uninsured persons. The Board concluded that the claims, which were based on a series of written agreements between the State and several hospitals, were not authorized under Alaska's Medicaid State plan, nor were they allowable under federal Medicaid statutes and regulations.

After review of the request for partial reconsideration and the documents that Alaska submitted with it, CMS's response to the reconsideration request, and Alaska's October 4, 2007 letter replying to CMS's response, we conclude that the request for partial reconsideration does not demonstrate a clear error of fact or law. We therefore deny the request.

Case background

Alaska's Medicaid State plan provided for supplemental payments under the Medicaid upper payment limits to be made to private hospitals during the period at issue, July 1, 2005 - September 30, 2006. The State referred to these payments as "Private Hospital Proportionate Share Incentive Payments" or "Private Proshare" payments. The State plan also provided for Disproportionate Share or DSH payment adjustments to be made to

certain eligible hospitals during the same period. The State entered into a series of written Private Proshare and DSH agreements with several hospitals and claimed Medicaid federal financial participation (FFP) for payments made under the agreements. CMS determined that the FFP claims relating to both types of agreements were unallowable, and the Board sustained the disallowances.

Alaska's request for partial reconsideration addresses only the disallowances relating to two of the Private Proshare agreements, those that involved the provision of single point of entry psychiatric (SPEP) services. Accordingly, we address only the Private Proshare claims in this ruling.

The Board concluded that the Private Proshare payment claims were not allowable under the applicable sections of Alaska's State plan, governing statutes and regulations because, under the written agreements, the payments were not made to reimburse the hospital for inpatient hospital services it furnished to Medicaid recipients. Board Decision at 16-25. The Board concluded that the Private Proshare agreements in this case transformed the payments into funding for other purposes. Id. at 18-22. Instead of allowing the hospital to use the payments to offset costs incurred in providing covered inpatient services to Medicaid recipients, the written agreements explicitly identified the supplemental payments as funding for unauthorized "community service provider costs." Id. at 18-19. Furthermore, the Board observed, the Private Proshare payments were made in connection with a "systematic plan" by the State to use Medicaid funds to pay for costs previously borne by the State. Id. at 19-20.

The Board also determined that, in contravention of the State plan and federal requirements, most of the supplemental payments generally were passed through the hospital and used to pay third-party community service providers who performed the services. Id. at 20-23. However, the Board noted, under the two agreements between Alaska and Providence Health System (Providence) for performing and providing SPEP services, the payments were not passed through the hospital to a third-party community service provider. Id. at 13, 20. Instead, Providence itself performed the services and retained the payments. Id. The Board thus recognized that not all of the elements supporting disallowances of the claims applied in the case of the SPEP agreements. Nevertheless, the Board did not conclude that this distinction rendered the claims under the SPEP services agreements allowable.

Notably, in the briefs Alaska submitted on appeal of CMS's disallowances, Alaska argued that nothing in the State plan or

statutes limited the uses to which a hospital may put supplemental payments. Alaska Reply Br. at 2, 17; Alaska Response to CMS Surreply at 3. The Board rejected this argument. Board Decision at 21. The Board concluded that, although the approved State plan permitted Alaska to condition a hospital's receipt of a supplemental payment based on the hospital furnishing community or regional health care services, neither the State plan nor the federal regulations permitted Medicaid funds "to be diverted to pay for non-institutional, non-Medicaid costs." Id. In sum, the claims were not in fact claims for supplemental payments to reimburse the hospital for inpatient services because the agreements required the recipient institution to transfer the funds to support alternative programs. Id.

Analysis

The Board has the authority to reconsider a decision it has issued where a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13.

The State's partial reconsideration request characterizes the Board decision as upholding the Private Proshare disallowances on the grounds that, in most cases, the payments were not used to provide hospital services but instead were transferred to community service providers to fund services performed by those providers, the costs of which had previously been borne by the State. Based on the Board's reasoning, Alaska submits, FFP for the SPEP services should have been allowed because the services were hospital services performed by the hospital itself, the payments were retained by the hospital, the agreements were specifically intended to benefit Medicaid recipients, and the payments could not be characterized as "refinancing" a preexisting state-funded program.

In support of its request, Alaska submits the declaration of Susan Humphrey-Barnett, the Area Operations Administrator of Providence. Alaska Ex. C. Ms. Humphrey-Barnett describes the SPEP services as either in-person/on-site or crisis phone line "screening and assessment of individuals who arrive at (or contact) Providence with a psychiatric emergency." Id. ¶ 4. The "services serve the purpose of directing individuals, including Medicaid recipients, to the most appropriate setting," such as a community treatment center, the Alaska Psychiatric Institute (a State hospital), or another hospital. Id. ¶¶ 4, 6. The services, first offered in 2002, are furnished in or near the Providence emergency room and performed by Providence staff. Id. ¶ 3. Notably, neither Alaska's request nor Ms. Humphrey-

Barnett's declaration claims that the SPEP services are covered Medicaid inpatient hospital services.

The State also submits a letter replying to CMS's response to the State's request for partial reconsideration, in which Alaska now contends that the supplemental payments made in connection with the SPEP service agreements "were made to cover inpatient hospital services Providence Hospital had previously rendered." Alaska Reply to CMS Response to Appellant's Request for Partial Reconsideration at 1. "These supplemental payments," Alaska submits in its October 4, 2007 letter, "were conditioned on the hospital's provision of other services, the SPEP services, but they were not payments for those services." Id. Thus, Alaska alleges, the claims made in connection with the SPEP services agreements should be allowed based on the Board's own reasoning.

The Board will not reconsider a decision under 45 C.F.R. § 16.13 to address an issue that could have been raised before, but was not, or to receive additional evidence that could have been presented to the Board before it issued its decision, but was not.[*] Here, Alaska has not shown that the information supplied in Ms. Humphrey-Barnett's declaration could not have been presented to the Board before it issued its decision. Thus, we conclude that this is not newly-discovered evidence of the type warranting reconsideration.

Even if we were to take into account the information provided, however, we would conclude that Alaska has not shown a clear error in the Board's decision. The Board's decision recognized that not every factor supporting the disallowances of the Private Proshare claims existed in the case of the SPEP services agreements. Board Decision at 13, 20. Most notably, the hospital itself performed the SPEP services, and the hospital did not simply pass on the Private Proshare payments to other providers, retaining only an administrative fee. Id. Alaska's partial reconsideration request and Ms. Humphrey-Barnett's declaration provide additional information clarifying these distinctions between the SPEP services claims and the other Private Proshare claims. Nevertheless, we conclude that these

[*] This standard is similar to the one applied under Federal Rule of Civil Procedure 59(e), which authorizes a motion to alter or amend a judgment. In general, Rule 59(e) motions are granted only to correct manifest errors of law or fact or to consider newly discovered or previously unavailable evidence. See Wright, Miller & Kane, 11 Federal Practice and Procedure 2d § 2810.1. The Federal Rules are not controlling here, however.

factors alone are not sufficient to meet the State's burden to show that the SPEP payments made to Providence were allowable Medicaid expenditures.

While the State now contends that payments under the SPEP services agreements were made to cover inpatient hospital services that the hospital had previously performed, the payments were controlled by the language of the July 13, 2005 and July 7, 2006 SPEP services agreements themselves. Alaska Ex. 21; Alaska Ex. 34. Like the other Private Proshare agreements, the SPEP services agreements characterize the payments as being made for, or funding, services other than covered inpatient hospital services. Indeed, Alaska itself previously characterized the payments as funding for the SPEP services. Alaska Reply Br. at 6, n. 6. Under the "Purpose and Scope" section of each agreement, the "proportionate share payment to the Hospital [was] for the purpose of funding services administered by qualified community services providers . . . ." Section three of the agreements, "Priority and Payment," states that each agreement was "for single point of entry psychiatric ("SPEP") proportionate share payments." Section five, paragraph five of each agreement states that in the event of termination, the State "shall only be liable for payment in accordance with the payment provisions of this contract for services rendered before the effective date of termination," and that "[a]ny payments in excess of the approved expenditures shall be returned" to the State. Thus, the language of the agreements as a whole did not merely condition receipt of the supplemental payments on the hospital agreeing to perform SPEP services, but indicated that the payments were directly tied to and meant to fund those services. Moreover, while the approved State plan provided that the amount of annual Proshare payments for inpatient hospital services paid to each qualifying hospital would be distributed based on the number of "encounters" of qualifying services each hospital agreed to perform, the SPEP agreements required Providence to account to the State for its "expenditures" for SPEP services at termination, not to account merely for the number of SPEP encounters it had performed. Requiring the hospital to account for its SPEP expenditures in this way further demonstrates that the payments under the agreements were intended to fund the SPEP services themselves.

Accordingly, we reject the State's contention that the hospital furnished the SPEP services merely as a condition to receiving supplemental payments to offset its costs of providing inpatient hospital services to Medicaid recipients. Under the controlling agreements, the Private Proshare payments were transformed into funding for other costs. Consequently, FFP claims for the payments were not allowable under the State plan and governing

Medicaid statutes and regulations. Finally, we note that, even if the SPEP services furnished by Providence were not part of a specific program that the State had previously funded, the evidence cited in the Board's decision (at 19) regarding Alaska's intent to use Medicaid funds generally to supplant State expenditures applies to all Proshare payments.

In sum, Alaska's request for partial reconsideration does not show a clear error of fact or law in the Board Decision.

Conclusion

For the reasons described above, we deny the request for partial reconsideration.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member